

UTAH POWER AND LIGHT COMPANY

IBLA 70-60

Decided May 22, 1972

Appeal from decision (9181, Group 376, Idaho) by the Chief, Division of Cadastral Survey,
Bureau of Land Management, dismissing protest against the acceptance of a plat of survey.

Hearing ordered.

Boundaries -- Patents of Public Lands: Generally -- Public Lands:
Riparian Rights -- Surveys of Public Lands: Generally

In determining what land is conveyed under patents or grants of public land
bordering on a meandered body of water, the general rule is that the waterline
itself, not the meander line, constitutes the boundary except where there is fraud
or gross error shown in the survey of the lines or where the facts and
circumstances disclose an intention to limit a grant or conveyance to the actual
traverse lines.

Secretary of the Interior -- Surveys of Public Lands: Generally --
Surveys of Public Lands: Authority to Make

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands and to extend or correct the surveys of public lands, as necessary, to include lands omitted from earlier surveys.

Federal Employees and Officers: Authority to Bind Government --
Surveys of Public Lands: Generally

The action or inaction of Department employees cannot under the doctrines of estoppel or laches bar the Secretary of the Interior and his delegates from discharging their duty to determine if public lands have been omitted from an original survey and to survey those lands found to have been omitted.

Rules of Practice: Appeals: Hearings -- Rules of Practice: Hearings
-- Surveys of Public Lands: Generally

Although there is no right to a formal hearing on a protest against an omitted lands survey, the Board of Land Appeals may, in its discretion, order a hearing on the factual issues where warranted by the circumstances.

APPEARANCES: Terry L. Crapo, Holden, Holden, Kidwell, Hahn and Crapo, Idaho Falls, Idaho, attorneys for appellant.

OPINION BY MRS. THOMPSON

This is an appeal by the Utah Power and Light Company from a decision dated May 20, 1969, whereby the Chief, Division of Cadastral Survey, Bureau of Land Management, dismissed the appellant's protest against the Bureau's acceptance on November 22, 1968, of the plat of survey of certain lands in sections 15 and 16, T. 1 N., R. 37 E., Boise Mer., Idaho, along the Snake River, purportedly omitted from the original survey of that township approved on August 25, 1877.

The record shows that on February 5, 1969, a notice of acceptance of the more recent plat and the proposed official filing of it in the Idaho land office was published in the Federal Register, 34 F. R. 1734. The proposed filing was suspended until further notice. 34 F. R. 5447 (March 13, 1969).

Appellant filed a protest against the survey on March 13, 1969, alleging that it owns lands bordering on the Snake River and that the effect of the resurvey is to deprive it of such lands.

There is no apparent disagreement among the parties with the following statement of facts as set forth in the decision appealed from:

The exterior boundaries, subdivisional lines, and meanders of the Snake River in T. 1 N., R. 37 E., B.M., were originally surveyed by John B. David, Deputy Surveyor, in 1877, under a contract dated October 23, 1876. The plat representing these surveys was approved by the Surveyor General of Idaho on August 25, 1877. Patents based upon this plat were issued to Andrew T. Lawrence for lot 2 and W 1/2 SW 1/4, section 15, this township, under Final Certificate No. 467, Blackfoot Land Office, on July 18, 1893 and to Jannet Kerr for lot 3, section 15, and lots 5 and 6 of section 10, this township, under Final Certificate No. 590, Blackfoot Land Office, on October 24, 1894. Section 16, as it is shown on the 1887 plat, went to the State of Idaho as a Common School Grant under the Statehood Act of July 3, 1890 (26 Stat. 215). It appears that, through a chain of title, the Utah Power and Light Co. has acquired the lands described as lots 2 and 3, section 15, and lots 1 and 2, section 16.

The company's protest was considered by the Bureau as relating to the dependent resurvey of sections 15 and 16, T. 1 N., R. 37 E., B.M., and the showing of omitted lands along the Snake River fronting on lot 2, section 15 and lots 1 and 2, section 16. Lot 3, section 15, is unaffected by the resurvey in question.

According to the records, the Bureau of Land Management in April 1961 ordered an investigation and a conditional survey of land

purportedly omitted from prior surveys in T. 1 N., R. 37 E., B.M., Idaho, among other townships. As stated in the decision below:

The purpose of the investigation and survey was to determine whether there are areas of land between the original meanders of the Snake River which are actually islands separated from the mainland by channels of the river and which existed as land above the ordinary high-water mark of the river on July 3, 1890, when Idaho was admitted to the Union, and whether there are other areas of land between the original meanders which were omitted from the original survey "by reason of gross, erroneous location or by fraud."

The investigation resulted in a determination that along certain portions of the Snake River there are lands omitted from the original survey of the Snake River in sections 15 and 16 in T. 1 N., R. 37 E., B.M., among others.

Plats of survey describing 21.99 acres of omitted land in section 15 and 70.80 acres of omitted land in section 16, T. 1 N., R. 37 E., B.M., were accepted in behalf of the Director, Bureau of Land Management, on October 22, 1968.

The Bureau's decision stated that according to the official plat of survey approved August 25, 1877, the area of the lots under consideration conveyed to the patentees were:

Sec. 15, lot 2 -- 30.43 acres

Sec. 16, lot 1 -- 42.14 acres

Sec. 16, lot 2 -- 43.25 acres

TOTAL 115.82 acres

The decision also stated that according to the plat of survey accepted on October 22, 1968, there are areas of land opposite the above described lands lying between the east meander line or left bank of the Snake River as shown on the 1877 plat, and the actual east bank of the river as represented on the 1968 plat, to the following extent:

Opposite Lot 2, sec. 15, -- lot 5, 12.66 acres

Opposite Lot 1, sec. 16 -- lot 8, 8.80 acres

Opposite Lot 2, sec. 16 -- lot 9, 19.59 acres

TOTAL 41.05 acres

No omitted land is represented as being opposite lot 3, section 15. [Lot 3 is along the west or right bank of the Snake River.]

The Bureau decision noted that, disregarding lot 3, section 15, the total patented acreage of lot 2, section 15 and lots 1 and 2, section 16, is 115.82 acres, and the total area of omitted lands lying opposite these lots, as shown on the 1968 plats, is 41.05 acres. [An omission of 35.48 percent]. In comparing the entire acreage of omitted lands with the

entire acreage of adjoining patented lands in each section, it pointed out there are 21.99 acres of omitted lands fronting on 55.85 acres adjoining patented lands in section 15, an omission of 39 percent, and there are 70.80 acres of omitted land fronting on 96.97 acres of adjoining patented land in section 16, an omission of 73 percent. In addition to concluding that the omission of lands was significant to show the original survey did not correctly meander the river and resulted in fraud upon the Government, the decision stated that the following facts demonstrate that this stretch of the river was not correctly meandered:

During the investigation and survey represented on the 1968 plat, it was found that the omitted lands averaged 10 feet above the surface of the Snake River in section 15 and 20 feet above the river surface in section 16, and are about the same elevation as other lands fronting on the river in these sections not claimed to be omitted. With the exception of some canal work on the east side of the river in these sections, there is no evidence that the course of the river has substantially changed from its present location by erosion or accretion since the original survey in 1877.

There are two major thrusts to appellant's contentions on appeal from the Bureau's decision. The first relates to this Department's authority to conduct the survey of the omitted lands; the second relates to the sufficiency of the facts to support the survey. Appellant has also requested a hearing.

On the first point appellant contends that regardless of the meander line established by the 1877 survey, the true boundary of its

property is the Snake River. In determining what land is conveyed under patents or grants bordering on a meandered body of water the general rule is that meander lines are not to be treated as boundaries, their purpose being to produce an average definition of the sinuosities of the body of water "closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream," Mitchell v. Smale, 140 U.S. 406, 413 (1891). Rather, the lake or stream itself is the true boundary. See also United States v. Lane et al., 260 U.S. 662 (1923); Railroad Company v. Schurmier, 74 U.S. (7 Wall.) 272 (1868).

There are exceptions to the general rule that the water body rather than the meander line is the boundary. In Mitchell v. Smale, supra, at 413, the Supreme Court indicated that where there was mistake or fraud in the survey the Government is not bound and the survey can be corrected. In Lee Wilson & Company v. United States, 245 U.S. 24, 29 (1917), the Court indicated that where through fraud or error a meander line is mistakenly run, riparian rights do not attach because the existence of the body of water upon which they depend does not exist, and the Land Department (now Department of the Interior) has power to survey the excluded area and to dispose of it lawfully. In Producers Oil Co. v. Hanzen, 238 U.S. 325, 339 (1915), the Court discussed the general rule but then stated:

* * * facts and circumstances may be examined and if they affirmatively disclose an intention to limit the grant to actual traverse lines, these must be treated as definite boundaries. It does not necessarily follow from the presence of meanders that a fractional section borders a body of water and that a patent thereto confers riparian rights.

These decisions establish three situations in which meander lines will serve as the boundary of a conveyance or grant, rather than a water body: namely, where there is (1) fraud or (2) gross error shown in the survey, or (3) where the facts and circumstances disclose an intention to limit a grant or conveyance to the actual traverse lines. Clearly there is authority of the Secretary of the Interior to determine whether these situations obtain. Indeed, the Secretary of the Interior has a duty to determine what lands are public lands, and to extend or correct the surveys of public lands, as necessary, to include lands omitted from earlier surveys. Kirwan v. Murphy, 189 U.S. 35, 54 (1903); Burt A. Wackerli et al., 73 I.D. 280 (1966) 1/ ; State of Oregon, 60 I.D. 314 (1949).

Nevertheless, appellant contends that this Department is barred from exercising such authority in this case under the doctrine of

1/ A suit arising from this decision is currently pending in the Federal District Court for the District of Idaho, Burt & Lueva G. Wackerli, et al. v. Stewart Udall, et al., Civil No. 1-66-92. The decision involves a protest against the survey of omitted lands along the Snake River in the township north of the township in this case.

estoppel because of the conduct of Departmental employees, beginning with the original surveyor and continuing with other employees who allegedly carried out flood control, reclamation and irrigation projects which reduced the flow of the Snake River from that in 1877, thereby lowering the mean high water line, causing the existence of the lands now claimed by the Bureau to have been omitted from the 1877 survey. It also contends the doctrine of laches bars this Department from making the resurvey due to the length of time between the original survey and the resurvey and because appellant and its predecessors have expended substantial sums of money in improving the land, relying on the patents and grants as extending the boundary to the Snake River.

The action or inaction of Departmental employees cannot under doctrines of estoppel and laches bar this Department from discharging its duty to determine what lands are public lands and what lands have been omitted from the original survey. The fact that administrative officers have mistakenly treated an area as subject to riparian rights of abutting owners does not estop the Government from surveying the lands as public lands and disposing of them after it discovers the mistake. Lee Wilson & Co. v. United States, *supra*. As stated by the Supreme Court in United States v. California, 332 U.S. 19, 40 (1947); involving the ownership of submerged lands on the continental shelf:

* * * The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches or failure to act.

See also R. A. Beaver, et al. v. United States, 350 F.2d 4 (9th Cir. 1965), cert. denied 383 U.S. 937, which held, in effect, that any implied acquiescence of Government officials to the plaintiff's improving lands did not under any doctrine of equitable estoppel or laches bar the Government from asserting its claim to riparian lands along the Colorado River, where there had been accretions due to the movements of the Colorado River, part of which may have been induced by actions of the Government.

Appellant contends that the Director's determination is defective as made without the existence of any record and based upon official notice of facts not open to inspection by appellant and which were not properly subject to official notice. There was a record. In the absence of some showing that appellant requested to see the records, such as the field notes of the surveys, survey plats, geological survey maps, etc., upon which the determination was based,

this contention must be rejected. Inspection of Departmental records may be made in accordance with 43 CFR Part 2 (1972).

We come now to the question of whether the facts support the conclusion that these lands are omitted lands which may be surveyed as public lands under the exceptions to the general rule discussed previously that meander lines are not boundaries. Appellant contends, in effect, that the percentage of the acreage of the lands claimed as omitted from the survey by the Government is not sufficiently large as compared with the patented land to establish that there was such a mistake or fraud so as to bring the exceptions to the rule in operation. It has also raised a factual question concerning the levels of the river at the time of the original survey and the latest survey. As we have discussed, any actions by Government officials affecting the river would not estop the Government from claiming omitted land as public land. If, however, appellant could establish that lands claimed as omitted are, in fact, accretions or relictions added to the patented lands since they were conveyed and since the original survey, because of changes in the river, such accreted or relicted lands could not be public lands omitted from the original survey.

Appellant has not submitted proof to support its allegations. Instead, it has requested that there be a hearing to prove the allegations. This Department in similar cases, e.g., Burt A. Wackerli,

supra; Giles R. and Juanita Leonard, A-30503 (March 23, 1966), has indicated there is no right to a formal hearing on a protest against an omitted lands survey and has determined the factual questions on the basis of the record presented by the Bureau and information presented by appellant. Even though there is no right to a hearing, when an appellant requests a hearing to present evidence on factual issues, this Board has discretion to refer the case to an examiner for a hearing. 43 CFR 4.415 (1972). Although there is some support for the Bureau's findings in the record before us, 2/ we believe appellant's request should be granted to give it the opportunity to present evidence to support its allegations. We believe the circumstances in this case warrant the presentation of evidence and development of the factual bases for decision after a formal hearing.

The ultimate factual issue upon which evidence should be received is whether all of the circumstances of the original survey and conveyances made pursuant to that survey affecting the lands in question here show that there was a mistake or fraud in the survey or that the conveyances were intended to be limited to the meander line rather than the actual water line, so that land lying between the meander line and the water line may be surveyed as public land of the United States. In

2/ Apparently, however, we do not have the complete record before us as a note in the record indicates that some material is with the Wackerli litigation file. See n. 1, supra.

other words, does this case fall within the exceptions to the general rule that the water body is the boundary line rather than the meander line, as discussed above?

As indicated in Burt A. Wackerli, supra, some of the factors to determine are: the area of the land omitted as compared with the area patented, the value of the land at the time of the original survey, the difficulty involved in surveying the land due to its topography, and the distance of the original meander line from the actual water line. With respect to the first factor, explanation by experts of the different bases of comparison and reasons why one basis is of more validity than another would be helpful. With respect to the last two factors mentioned, expert explanations of the field notes of the original survey relating to those factors and any other factors which might have bearing, would also be helpful. For example, do the original survey field notes or factual information revealed from the subsequent investigations indicate whether or not special instructions or general survey instructions of the Department were appropriately followed? Are there unexplainable deviations in the survey of the meander lines as compared with the rest of the survey which tend to show fraud or gross error? In addition, evidence may be presented of any changes in the water level of the river so as to affect the quantum of land lying between the meander line and the river bank between the date of the original survey and the latest survey.

At the hearing, the appellant will bear the burden of proof, it must go forward with evidence contradicting the facts stated in the Bureau's decision, and it must also bear the ultimate burden of persuasion.

This case shall be transferred to the Division of Hearings, Office of Hearings and Appeals, of this Department for assignment to an examiner for a hearing to be held in accordance with the rules in 43 CFR 4.430 to 4.439 (1972).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), a hearing is ordered and the case is transferred to the Division of Hearings, Office of Hearings and Appeals.

Joan B. Thompson, Member

We concur:

Newton Frishberg, Chairman

Joseph W. Goss, Member

